Money laundering could catch you out

The complex rules on money laundering may have wider application than you think. Sarah Hannam of Peters & Peters elaborates.

I anticipate that all of you reading this article will have at least some idea of what is meant by money laundering. I am equally certain that the vast majority of you will be confident that it has no real relevance to you day to day. Indeed, the very titles of the Acts themselves, The Drug Trafficking Act 1994, The Criminal Justice Act 1988 and 1993 and The Prevention of Terrorism (Temporary Provisions) Act 1989 tell you that it involves dark goings-on quite unrelated to your clinical finance functions.

However, with the ever-increasing ingenuity of those involved in money laundering, the widening scope of the anti-money laundering legislation and the severe criminal sanctions imposed upon those who offend against it, everyone should ensure that they have a proper awareness of this subject.

What is money laundering?

Money laundering is the way in which the proceeds of a crime are disguised to conceal their illegal origin. Funds generated by fraud, profits from drug trafficking and the proceeds of organised crime, emanating from all over the world, are legitimised in this way. It is an essential element of ongoing criminal activity, as it allows the perpetrators to use and benefit from their illegal gains. As such, it is something the UK Government and the European Commission are determined to target.

At its simplest, cash can be laundered by taking it to a Bureau de Change and exchanging it for another currency.

As you will be aware, on 1 January 2002, euro coins and bank notes will be introduced and by 30 June 2002, existing national currencies of those countries which have joined the euro will be withdrawn. This will lead to a six-month period in which there will be a huge amount of currency being exchanged, and there must be a fear that this volume of activity will be used to hide the introduction of illegally sourced funds.

Many countries, including the Netherlands, Germany and Italy, have set up particular studies into how this potential risk may be addressed.

Such cash exchanges are, of course, a very unsophisticated approach to money laundering. The use of the international banking system offers far greater opportunities. The increasing use of the internet to provide banking services, which may be accessed from anywhere in the world, and the difficulty of banks actually knowing such distant users, offers money launderers another technologically advanced tool.

The UK was the first country in Europe to introduce anti-money laundering legislation, with the introduction of the Drug Trafficking Offences Act in 1987. First directed at the proceeds of drug trafficking, the legislation was then extended to funds derived from terrorist activity, and finally to most serious criminal offences.

How is money laundered?

Traditional reviews state that most systems of money laundering are made up of three key elements:

- **placement**: putting illegally obtained cash into the banking system;
- **layering**: using a web of fund movements, often associated with complicated transactions, to disguise the source of the funds and to put a distance between that source and where the funds now are; and
- **integration**: reintroducing the monies into the financial system as apparently legitimate funds.

Sarah Hannam

Money laundering offences

There are five basic offences under the money laundering legislation.

Assistance – helping another to obtain the benefit of the proceeds of criminal activity.

This involves helping a person whom one knows or suspects has been engaged in or benefited from criminal conduct to retain or control the proceeds of such conduct by concealment, removal from the jurisdiction, transfer to nominees or otherwise.

It is a defence if the person did not know or suspect that the help being given was in relation to the proceeds of anyone's criminal conduct.

In addition, it is also a defence if the person who knows or suspects that he may be committing or about to commit such an offence reports it immediately, either to his employer in compliance with his internal reporting system, or direct to a constable (in practice, NCIS). He will also have a defence if he intended to make such a report but had a reasonable excuse for not doing so.

Acquisition – the acquisition, possession or use of the proceeds of criminal activity. A person commits an offence if he knows that property is wholly or partly, directly or indirectly, the product of another person's criminal conduct and he acquires or uses that property or has possession of it.

In relation to this offence, suspicion is not enough: actual knowledge is a key element of the offence. It is a defence if the property is acquired for adequate consideration or if a report is made, or intended to be made, as set out above.

Concealment – concealing or transferring the proceeds of criminal activity.

Where a person knows, or has reasonable grounds to suspect, that any property is wholly or partly, directly or indirectly, the proceeds of another person's criminal conduct and he conceals, disguises, converts, transfers or removes it from the jurisdiction for the purpose of assisting anyone to avoid prosecution, then he commits an offence.

It is important to note that the test of whether a person had reasonable grounds to suspect is an objective one.

Failure to disclose – failing to disclose knowledge or suspicion of money laundering in relation to the proceeds of drug trafficking or terrorist activities.

If a person had knowledge or suspicion of drug trafficking or terrorism related money laundering gained in the course of trade, profession, business or employment, it is an offence if he fails to report it either in accordance with his employer's internal reporting system or to a constable. It is a defence to prove that there was a reasonable excuse for failing to make the necessary report.

Tipping off – disclosing information in order to prejudice a criminal investigation.

It is an offence to prejudice an investigation, or possible investigation, by disclosing to another person information likely to be prejudicial, knowing or suspecting that a constable is acting or is proposing to act in connection with an investigation or knowing or suspecting that a report under the money laundering legislation has been made, either under internal reporting systems, or to a constable. There is a general defence available of proving that a person did not know or suspect that the disclosure was likely to be prejudicial to the investigation.

The offence does not apply to a professional legal adviser who discloses information to his client in connection with giving legal advice or in connection with legal proceedings and for the purpose of those proceedings.

The first three offences are punishable by up to 14 years' imprisonment, the latter two by up to five years.

Criminal conduct/fiscal offences

An understanding of what is meant by 'criminal conduct' is essential to understanding these offences. In summary, it means most serious criminal offences, ie any offence which is indictable in the Crown Court or is a schedule 4 offence in the Magistrates Court.

There has been much debate about whether the legislation applies to fiscal offences. I am of the view that it clearly applies to the proceeds of tax evasion derived from the fraudulent non-payment of UK tax. More complicated are the arguments as to whether the definition of criminal conduct extends to the evasion of foreign taxes.

The Court will consider whether the proceeds are derived from activity which, if committed in the UK, would constitute a criminal offence. It is arguable that because foreign tax evasion is not an offence in the UK, the legislation does not cover it. Here, I take the view that it is prudent to assume that it does, at least so far as taxes that have a natural comparable here are concerned, such as income and corporation taxes. Further, tax evasion will almost certainly involve other offences which could amount to criminal conduct in their own right, like false accounting.

Money laundering regulations 1993

While the primary legislation applies to everyone, the regulations only apply to those carrying out "relevant financial business". They impose obligations to maintain systems including identification, record keeping, internal reporting, and control and communication procedures. In addition, appropriate measures must be taken to ensure that employees whose duties include the handling of relevant financial business are aware of these procedures and are provided with training in the recognition and handling of transactions which may involve money laundering.

Who should be concerned?

In the past considerable emphasis was placed on money laundering through banks. At first blush, it would appear that the banks have been best at implementing training regimes and reporting systems and, indeed, making disclosure reports. The NCIS' annual report for 1998/99 shows that, of disclosures made in 1998, 44.1% came from banks. However, this figure may be misleading, as of the 500-plus deposit-taking institutions in the UK, eight were responsible for some 70% of disclosures in recent years.

As well as bankers, securities traders, accountants, solicitors, those in the insurance industry and company formation agents are also subject to the provisions. Criticism has been voiced by the NCIS of the lack of disclosures from these sectors and it is fair to assume that they will be focused on in the future.

The European Commission

The European Commission has proposed a Second Money Laundering Directive to extend the provision of its first directive, which was targeted at drug trafficking and terrorist activities, to the proceeds of other serious crime including fraud. Its aim is to strengthen existing rules for financial institutions and other businesses across the EU in the fight against serious crime, bringing Europe closer to the UK approach.

In October of last year the economic secretary, Melanie Johnson, welcomed the Commission's proposals, but commented that the UK, "will pay close attention to ensuring that the costs of compliance do not exceed the likely benefits." This is something that should be borne in mind, given that the NCIS' annual report for 1998/99 revealed that of some 14,129 disclosures received by ECU in 1998, only 136 cases resulted in prosecutions. ■

Sarah Hannam is a partner in Peters & Peters, specialising in commercial litigation and Inland Revenue investigations and prosecutions.

Investigators and prosecutors

NCIS – The Economic Crime Unit (ECU) of the National Criminal Intelligence Service (NCIS) is responsible for receiving, analysing and disseminating financial disclosures. It draws its staff from the police, Customs & Excise and, more recently, the Inland Revenue.

FSA – The new Financial Services Authority will work with the NCIS to identify patterns within market sectors. The FSA will be given the power to prosecute criminal breaches of the Regulations. It is preparing its own guidance notes which will augment those of the Joint Sterling Group and the solicitors' and accountants' professional bodies.